IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No.514 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment?

2 To be referred to the Reporter or not?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder?

5 Whether it is to be circulated to the Civil Judge?

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SHANTILAL HINDAJI MEGHVAL - Appellant

Versus

STATE OF GUJARAT - Respondent

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Appearance :
MR BS SUPEHIA for Appellant.
MR KT DAVE, APP for Respondent.
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 19/12/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

Instant appeal filed under Section 374(2) of the Code of Criminal Procedure, 1973, is directed against judgment dated May 15, 2000 rendered by the learned

Special Judge, Panchmahals at Godhra, in Special Case No.4 of 1999 by which the appellant is convicted for commission of offences punishable under Sections 17 and 18 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (“the Act” for short) and sentenced to suffer R.I. for ten years and fine of Rs.1 Lakh, in default R.I. for three years.

2. The facts emerging from the record of the case are as under:

On May 28, 1999, Police Inspector Mr.Masurbhai Lalbhai Vagadia of Godhra Town Police Station was on patrolling duty with Police Constable Mr.Rajendrasinh Khumansinh, Police Constable Mr.Gajendrasinh Ranjeetsinh, Police Constable Mr.Harishchandrasinh, etc. While on patrolling, he came opposite Bus Stand of Lalbaug on highway and halted. He spotted a person coming from Bus Stand. The movement of the person, who was coming from Bus Stand, aroused his suspicion because on seeing police personnel, the said person started walking in the opposite direction. Therefore, PI Mr.Vagadia instructed Police Constable Mr.Gajendrasinh to apprehend the said person and bring him before him. Accordingly, the said

person was apprehended and brought before Mr.Vagadia. It was found that he was carrying a rexine bag. On interrogation, he disclosed his name to be Shantilal Hindaji Meghval, i.e. the appellant. Mr.Vagadia suspected that some contraband substance was kept in the rexine bag. He, therefore, requisitioned services of two panch-witnesses and decided to search the rexine bag carried by the appellant. Before effecting the search of the rexine bag carried by the appellant, PI Mr.Vagadia offered the appellant to be searched in presence of a magistrate or a gazetted officer. The appellant desired that he should be examined in presence of another gazetted officer. Therefore, from a nearby S.T.D. Booth, PI Mr.Vagadia contacted Sub Divisional Police Officer Mr.Bharada and requested him to be at the spot so that the bag carried by the appellant could be searched. After arrival of Sub Divisional Police Officer Mr.Bharada, the rexine bag carried by the appellant was searched, which resulted into find of opium. Police Constable Harishchandra was directed to requisition services of someone to weigh the substance found from the possession of the appellant. Accordingly, Police Constable Harishchandra requisitioned services of Akbarali Tahirali Vora. Mr.Vora came to the spot with scales and weights. Mr.Akbarali Tahirali

weighed the substance found from the possession of the appellant and its weight was ascertained to be 1 Kilogram & 500 Grams. PI Mr.Vagadia demanded from the appellant pass or permit authorizing him to possess opium, but none could be produced by the appellant. He, therefore, got drawn the panchnama indicating search of the bag carried by the appellant and find of opium therefrom. Out of the quantity of opium found from the possession of the appellant, a sample of 500 Grams was drawn which was sealed as required by law. PI Mr.Vagadia lodged his complaint with Police Station Officer of Godhra Town Police Station. He produced his complaint, panchnama, *muddamal,* appellant, etc. before the Police Station Officer. On the basis of the complaint of Mr.Vagadia, offences punishable under the Act were registered against the appellant. The complaint of PI Mr.Vagadia was handed over to PSI Mr.Bhairavsinh Salamsinh Chauhan for investigation. The Investigating Officer recorded statements of those persons who were found to be conversant with the facts of the case. The sample drawn was sent to Forensic Science Laboratory for analysis. The report of analysis indicated that the substance analysed was opium within the meaning of the Act. On completion of the investigation, the appellant was chargesheeted in the

Court of learned Special Judge, Panchmahals at Godhra, for commission of offences punishable under Sections 17 and 18 of the Act, on the basis of which, Special Case No.4 of 1999 was registered.

3. The learned Special Judge framed necessary charge against the appellant at Exh.2. It was read over and explained to him. He pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) panch Mahendrasinh Rajasinh Thakore as P.W.-1 at Exh.7; (2) panch Ashokkumar Mohanlal Rathod as P.W.-2 at Exh.10; (3) Police Constable Gajendrasinh Ranjeetsinh as P.W.-3 at Exh.11; (4) Police Constable Rajendrasinh Khumansinh as P.W.-4 at Exh.12; (5) Akbarali Tahirali Vora as P.W.-5 at Exh.14; (6) Police Inspector Mr.Masurbhai Lalabhai Vagadia as P.W.-6 at Exh.15; (7) Investigating Officer, PSI Mr.Bhairavsinh Salamsinh Chauhan as P.W.-7 at Exh.18, to prove its case against the appellant. The prosecution also produced documentary evidence such as panchnama indicating search of rexine bag carried by the appellant and find of 1 Kilogram and 500 Grams of opium therefrom at Exh.8; complaint of Mr.Vagadia at Exh.16; report of analysis at Exh.22; biological report at Exh.24; etc. in support of its case

against the appellant.

4. After recording of evidence of prosecution witnesses was over, the learned Judge of the trial Court explained to the appellant the circumstances appearing against him in the evidence of prosecution witnesses and recorded his further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In his further statement, the appellant stated that a false case was foisted upon him. According to the appellant, he was arrested from Marvadivas when he was collecting donation for the temple and that two receipts were also found from his possession when he was arrested. It was claimed by the appellant that he was never arrested near the Bus Stand nor he was found in possession of the offending substance and that he was innocent. He sought permission of the Court to produce book indicating the receipts issued by him for having received donation on behalf of the temple. However, no defence evidence was adduced by him in support of the claim advanced by him in his further statement.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that the testimony

of PI Mr.Masurbhai Lalabhai Vagadia recorded at Exh.15, which was supported by the evidence tendered by Police Constable Gajendrasinh and Police Constable Rajendrasinh, was trustworthy and cogent. Placing reliance on the testimony of PI Mr.Vagadia, the learned Judge held that it was proved by the prosecution beyond reasonable doubt that on May 28, 1999, the appellant was found in possession of 1 Kilogram & 500 Grams of opium without pass or permit and, therefore, was liable to be convicted for commission of offences punishable under Sections 17 and 18 of the Act. The learned Judge disbelieved the defence of the appellant that he was apprehended from Marvadivas when he was collecting donation on behalf of the temple. In view of aboverefferedto conclusions, the learned Judge has convicted the appellant for commission of offences punishable under Sections 17 and 18 of the Act and imposed sentence referred to earlier by judgment dated May 15, 2000, giving rise to instant appeal.

6. This Court has heard Mr.B.S.Supehia, learned counsel of the appellant, and Mr.K.T.Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record

with reference to broad and reasonable probabilities of the case.

7. The case of the prosecution is that by possessing opium without pass or permit, the appellant had committed offences punishable under Sections 17 & 18 of the Act. Section 17 prescribes punishment for contravention in relation to prepared opium whereas Section 18 prescribes punishment for contravention in relation to opium poppy and opium. However, the report of the analysis prepared by the Forensic Science Laboratory, which is produced by the prosecution at Exh.23, indicates that the substance recovered from the appellant had 0.91 per cent anhydride morphine. As per Section 2(xvi), "*opium derivative*", *inter alia,* means all preparations which contain more than 0.2 per cent of morphine or containing any diacetyle morphine. This is evident if one peruses Section 2(xvi)(e) of the Act. The residuary clause (e) would take into its sweep all preparations containing more than 0.2 per cent of morphine. All "*opium derivatives*" would fall within the expression of 'manufactured drug' as defined under Section 2(xi) of the Act. Thus, the appellant should have been convicted for commission of offence punishable under Section 21 of the Act. This is so in view of the decision of the

Supreme Court in **Amarsingh Ramjibhai Barot vs. State of Gujarat, (2005) 7 SCC 550.** Therefore, the conviction of the appellant for commission of offences punishable under Sections 17 and 18 of the Act is liable to be converted into one punishable under Section 21 of the Act.

8. However, on reappreciation of the evidence adduced by the prosecution, this Court finds that panch-witness Mahendrasinh Thakore has not stated in his examination-in-chief that he had signed slip, which was affixed on *muddamal.* What he has stated is that he had signed only panchnama at the Police Station. He did not support the prosecution and was, therefore, treated as hostile to the prosecution. In his cross-examination by the learned Additional Public Prosecutor, it was stated by him that on *muddamal,* which was produced before the Court, there was a slip bearing his signature, but the suggestion made by the learned Additional Public Prosecutor for the State that he had also signed the slip, which was affixed on *muddamal* sent to Forensic Science Laborator*,* was emphatically denied by him. Similar is the testimony of another panch-witness Ashokkumar Rathod, who is examined at Exh.10. Though both the panch-witnesses denied their signatures on the slip, which was affixed on *muddamal,* it could not be proved by the prosecution that the slip was signed by

them or any one of them. The Police Officers could have stated before the Court that they had seen both the panch-witnesses sign the slip which was affixed on the *muddamal* sent to the Forensic Science Laboratory. But, such statement is not made by any of the Police Officers examined in the case. It is relevant to notice that no police statements of panch-witnesses were recorded by Investigating Officer Mr.Bhairavsinh Chauhan. Thus, it is not proved satisfactorily that offending substance was found from possession of the appellant in presence of independent panch-witnesses. It is relevant to notice that according to the prosecution, before effecting search of rexine bag carried by the appellant, PI Mr.Vagadia had offered search to be carried out in presence of a magistrate or a gazetted officer and as the appellant had desired that search of the bag carried by him should be made in presence of a gazetted officer, Mr.Bharada, who was Sub-Divisional Police Officer, was requested to be at the spot and in his presence, the rexine bag carried by the appellant was searched. However, it is neither the case of panch Mahendrasinh examined at Exh.7 nor the case of panch Ashokkumar Rathod examined at Exh.10; nor the case of Police Constable Gajendrasinh examined at Exh.11; nor the case of Police Constable Rajendrasinh examined at Exh.12; nor the case

of PSI Mr.Vagadia examined at Exh.15 that the slip which was affixed on *muddamal* sent to Forensic Science Laboratory was also bearing signature of Sub Divisional Police Officer over and above the signatures of panch-witnesses and PI Mr.Vagadia. However, the report of the analysis produced by the prosecution at Exh.23 would indicate that the slip which was allegedly affixed on the *muddamal* was also bearing signature of Sub Divisional Police Officer of Godhra Division. This vital discrepancy is not explained by any of the prosecution witnesses and the Sub Divisional Police Officer of Godhra Division is not examined as one of the prosecution witnesses in this case.

9. Further, this Court finds that though the raid was carried out on May 28, 1999, the *muddamal* was sent to Forensic Science Laboratory on June 2, 1999, i.e. on sixth day of the raid. No one is examined by the prosecution to prove as to who was handed over safe custody of the *muddamal* and who had taken the *muddamal* to Forensic Science Laboratory for analysis. Delay by itself may not be fatal to the prosecution more particularly when the report of the analysis indicates that *muddamal* was received intact. However, it is the duty of the prosecution to satisfactorily establish before the Court

that the *muddamal* was kept in safe custody and that it had reached the Forensic Science Laboratory intact. The delay of six days cannot be considered to be insignificant more particularly when no one is examined to establish that during this interregnum period, the *muddamal* was kept in safe custody and that it had reached the Forensic Science Laboratory intact. Therefore, this Court is of the opinion that there was every possibility of tampering with the *muddamal* when it was lying at the Police Station notwithstanding the fact that it is mentioned in the report of the Forensic Science Laboratory that the *muddamal* was found intact. This aspect becomes significant if one peruses the testimony of Police Constable Gajendrasinh. This witness has stated that after placing slip bearing signatures of panch-witnesses, seal was applied. However, he has not stated that after placing the slip bearing signatures of panch-witnesses on tin, the tin was tied with a twine. It means that the slip bearing signatures of panch-witnesses could have been used again. Further, it is not mentioned by any of the Police Officers examined in the case that while they were on patrolling duty, they had also carried with them materials necessary for seizure and sealing the contraband substance. This Court fails to understand as to how the tin in which *muddamal* drawn was placed, was

secured nor there is satisfactory evidence on record to establish that twine was secured and/or seal was secured and that thereafter applied on *muddamal.* It is relevant to notice that seal usually would be kept in the custody of Police Officer in charge of Police Station and, therefore, it was necessary for the prosecution to lead satisfactory evidence that after contraband substance was found from the possession of the appellant, seal was called for and thereafter, properly applied on the *muddamal.* It is relevant to notice that admission made by Police Constable Gajendrasinh in paragraph 2 of his testimony makes it evident that during the search, two receipts indicating that the amount was collected by the appellant by way of donation for the temple, were recovered. Thus, to some extent, the defence pleaded by the appellant is probabilized.

10. It is true that merely because panch-witnesses have turned hostile, the Court need not throw the prosecution case over-board if it is otherwise found to be trustworthy from the testimony of Police Officials examined in the case. In this case, it is admitted by Police Inspector Mr.Vagadia that he and others were given cash rewards by District Superintendent of Police for carrying out the raid. In a sense the Police Officers

will have to be regarded as interested witnesses and their version cannot be accepted as gospel truth unless corroborated in material particulars by independent evidence. What is significant to note is that the provisions of Section 57(2) of the Act were not complied with at all by PI Mr.Vagadia. This Court is aware that provisions of Section 57(2) of the Act are held to be directory by the Supreme Court. However, there is no manner of doubt that even directory provisions of law are required to be substantially complied with. The record does not show that the provisions of Section 57(2) of the Act were complied with at all. Taking cumulative effect of the circumstances pointed out above, this Court is of the opinion that the prosecution has failed to prove its case beyond reasonable doubt and, therefore, the appellant is entitled to reasonable benefit of doubt arising from the facts of the case. The appeal, therefore, will have to be allowed and the appellant will have to be acquitted.

For the foregoing reasons, the appeal succeeds. Judgment dated May 15, 2000 rendered by the learned Special Judge, Panchmahals at Godhra, in Special Case No.4 of 1999 convicting the appellant under Sections 17 & 18 of the N.D.P.S. Act, 1985 and sentencing him to R.I.

for ten years and fine of Rs.1 Lakh, in default R.I. for three years, is hereby set aside. Instead, the appellant is acquitted. The respondent is directed to set the appellant at liberty forthwith unless his presence in Jail is needed with reference to any other case. Muddamal be disposed of in terms of the directions given by the learned Judge of the trial Court in the impugned judgment.

[J.M.PANCHAL, J.]

[H.B.ANTANI, J.]

Rajendra